82-1708

No.

In The Supreme Court of the United States
October Term 1982

KENNETH G. RUSH and the FIFTH THIRD BANK,
Trustees
Petitioners

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR
WRIT OF CERTIORARI
To The United States Court of Appeals
For The Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

1. Are petitioners entitled to deductions under 26 *U.S.C. (Internal Revenue Code of 1954)* § 642 (c) in the years 1973 and 1974 for certain amounts permanently set aside by the trustees of a trust for the benefit of charitable institutions?

PARTIES TO THE PROCEEDING

Kenneth G. Rush and North Carolina National Bank Successor to the Gulfstream Bank successor to The Fifth Third Bank Trustees under Trust established by Linus E. Russell.

Petitioners

v.

United States of America
Respondent

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Petitioner Trustees respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit be entered in this proceeding on December 17, 1982 (rehearing denied January 21, 1983).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, decided and filed December 17, 1982, is reported at 694 F.2d 1072 (6th Cir. 1982). The opinion of the United States District Court for the Southern District of Ohio, decided and filed September 15, 1981, is reported at 81-2 U.S. Tax Cas. (CCM) ¶9715 (S.D. Ohio 1981).

The opinion of The United States Court of Appeals for the sixth circuit on petition for rehearing, decided and filed January 21, 1983 has not been reported and appears in the appendix attached hereto.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit, reversing the judgment of the U.S. District Court for the Southern District of Ohio, was entered on December 17, 1982. A timely petition for rehearing was denied on January 21, 1983 and this petition for certiorari is filed within 90 days of that date. This court's jurisdiction is invoked pursuant to 28 *U.S.C.* §1254 (1) and 28 *U.S.C.* § 1346 (a).

STATUTE INVOLVED

26 *U.S.C. (Internal Revenue Cole of 1954).* §642 (c) (2) provides:

> (2) AMOUNTS PERMANENTLY SET ASIDE — In the case of an estate, and in the case of a trust (other than a trust meeting the specifications of subpart B) required by the terms of its governing instrument to set aside amounts which was–
>
> (A) created on or before October 9, 1969, if–
>
> (i) an irrevocable remainder interest is transferred to or for the use of an organization described in section 170(c), or
>
> (ii) the grantor is at all times after October 9, 1969, under a mental disability to change the terms of the trust; or
>
> (B) established by a will executed on or before October 9, 1969, if–
>
> (i) the testator dies before October 9, 1972, without having republished the will after October 9, 1969, by codicil or otherwise,
>
> (ii) the testator at no time after October 9, 1969, had the right to change the portions of the will which pertain to the trust, or
>
> (iii) the will is not republished by codicil or otherwise before October 9. 1972, and the testator is on such date and at all times thereafter under a mental disability to republish the will by codicil or otherwise,

there shall also be allowed as a deduction in computing its taxable income any amount of the gross income without limitation, which pursuant to the terms of the governing instrument is during the taxable year, permanently set aside for a purpose specified in section 170(c), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance, or operation of a public cemetery not operated for profit. In the case of a trust, the preceding sentence shall apply only to gross income earned with respect to amounts transferred to the trust before October 9, 1969, or transferred under a will to which subparagraph (B) applies. (emphasis added)
26 U.S.C. §642(c)

STATEMENT OF THE CASE

Under §642 (C) (2) (A) a trust created on or before October 9, 1969, is allowed a charitable deduction if an irrevocable remainder interest is transferred to or for the use of qualified charitable organizations. The trust at issue, created in 1968, was revocable by the grantor until his death in February, 1970. The District Court allowed charitable deductions for the year 1973 and 1974 for amounts permanently set aside for charities in those years; amounts set aside after the death of Linus E. Russell, the only person having the power to revoke the trust.

On September 30, 1968, Linus E. Russell created and executed a trust naming Kenneth L. Rush and The Fifth Third Union Trust Company as Trustees. This trust was funded on this date with Three Million Six Hundred Thousand Dollars ($3,600,000.00). This trust provided, inter alia, that after the death of the settlor, Linus E. Russell, it was to be divided into two parts. Trust No. 2 in such division provided that the income should be accumulated until the death of testator's wife. The trust provided further:

"Upon the death of the last to die of Ruth B. Russell, Jill Justice and Joseph Justice (stepchildren and income beneficiaries only after the death of Ruth B. Russell) the principal and accumulated income of each and every trust created hereunder shall be paid over in equal shares to the Sisters of Mercy of Cincinnati, Ohio, Inc. for the use and benefit of Mercy Hospital, Springfield, Ohio, and to the Board of Directors of Wittenberg College, Springfield, Ohio, to be used in such manner as the governing bodies of each shall determine."

Under this arrangement income in the amount of Forty-Two Thousand Eight Hundred and Eighty-three and 01/100 Dollars, ($42,883.01) and Eighty-four Thousand Four Hundred Eighty-six and 01/100 Dollars ($84,486.01) was accumulated in 1973 and 1974, added to the principal, and thereby permanently set aside as required in the trust for a purpose as set forth under 26 U.S.C. § 170. A deduction was taken, disallowed; the tax was paid and this refund action was brought.

This trust further provided in § 13 on Page 12 of said trust:

"XIII. *Amendment and Revocation.* The settlor reserves the right any time and from time to time by instrument in writing delivered to the trustees, to amend, modify or revoke this trust in whole or in part."

On December 8, 1969, the settlor, Linus E. Russell, entered Mercy Hospital in Springfield, Ohio, in a confused state, unable to attend to his financial affairs. On December 22, 1969, he became comatose. This condition continued until the settlor, Linus. E. Russell, died on February 5, 1970.

On December 30, 1969, eight days after settlor became comatose, the Congress passed and the President signed, a bill enacting those sections pertinent to this action and

under which the disallowances were made by the Internal Revenue Service, giving rise to this cause of action.

It is agreed by the parties hereto by stipulation that the trust was executed prior to October 9, 1969; that the amounts in question were permanently set aside for the charitable beneficiaries in 1973 and 1974.

The trust provides for the accumulation of income and the payment of that accumulation to charities.

The Federal jurisdiction was, in the lower courts, based upon 28 *U.S.C.* § 1346 (a).

REASONS FOR GRANTING THE WRIT

This case is one of first impression for this court. At present, the only courts which have reviewed the question at issue are the lower courts in this case. The differing opinions of the two courts leave a substantial question as to the proper interpretation of *Internal Revenue Code* § 642. The current state of affairs may cause numerous taxpayers to forego their rights provided for under that section, or cause further litigation by other parties.

The central issue in this case is whether a trust, revocable as of October 9, 1969, is entitled to a deduction under § 642 (c) (2) of the *Internal Revenue Code* for amounts permanently set aside for the benefit of two charitable institutions in the years 1973 and 1974 when, at the time the amounts were set aside, the trust was irrevocable. The critical provision is § 642 (c) (2) (A) (i) which provides that a trust, created on or before October 9, 1969, is entitled to such a deduction where "an irrevocable remainder interest is transferred" to or for the use of a charitable institution.

The thrust of this petition is an appeal to this Honorable Court to uphold the integrity of the Internal Revenue Service Laws and the taxing process. Central to this petition

is the proposition that a taxpayer has the right to follow the plain wording of the statute and, having done so, should be taxed in conformance therewith. By judicially changing the word "or" to "and" and "is" to "was" the judgment of the Court of Appeals has penalized a taxpayer who has followed the plain garammatical wording of a statute.

ARGUMENT

I

WHERE THE WORDING IS PLAIN A STATUTE SHOULD BE READ IN TERMS OF ORDINARY GRAMMAR AND COMMON ENGLISH USAGE. BY CHANGING "OR" TO "AND" AND "IS" TO "WAS" THE APPELLATE COURT HAS VIOLATED THIS PRINCIPLE, AND REWRITTEN THE STATUTE.

While there are a number of criteria and rules for the interpretation of statutes, it seems quite clear that if the language is plain a statute should be read and construed according to the rules of grammar and common usage (Uniform Statutory Construction Act §2). The principle has been recently reaffirmed by this Court (Diamond v. Diehr, 450 U.S. 175 [1981] United States v. Turkette 452, U.S. 576 [1981] Howe & Smith 452 U.S. 473 [1981]). This court has pointed out that where the terms of the statute are unambiguous the inquiry of the United States Supreme Court as to the meaning of the statute comes to an end (Howe v. Smith op cit).

Nowhere is this more important than in the tax collection process. This process has been for years self-enforcing. To create clouds and play lawyer's word games, while intriguing, can undermine this process. Thus, if a taxpayer complies with the plain wording of the statute he has done that which is required of him and should be taxed accordingly.

The taxpayer here did follow the plain wording of the statute, (Rush v. United States, 81-2 USTC (CCM) ¶9715 [SD Ohio 1981] App. A-1) and therefore should receive the deduction. The government has twisted the ordinary language. They have argued (successfully in the Appellate Court) that "or" as found at the end of §642 (c) (2) (A) (i) be changed to "and" so as to incorporate the following Section, §642 (C) (2) (A) (ii), and "is" should be changed to "was" as it is found in the body of §642 (c) (2) (A) (i). This undermines both the English language and the compliance ethic. In effect the government has rewritten the statute and acheived a result not provided for in that statute. Thus playing fast and loose with the statute.

This of course is a transitional rule; a difficult area for draftsmen. The same pattern has come up before and will again (i.e. powers of attorney rules etc.). The import of this case goes beyond The parties, to instruct draftsmen in the transitional area "say what you mean."

II

A. THE LANGUAGE OF *I.R.C.* § 642 (c) (2) (A) (i) PROVIDES ON ITS FACE THAT THE REMAINDER INTEREST NEED BE IRREVOCABLE ONLY AT THE TIME IT IS TRANSFERRED FOR CHARITABLE PURPOSES.

The statutory language is clear on its face that the remainder interest need only be irrevocable at the time of the transfer. As noted by the district court's opinion in this case, the "word 'is' in subpart (i) of § 642 (c) (2) (A) indicates that the circumstances existing on the date of the transfer govern deductibility." *Rush v. United States*, 81-2 U.S. Tax. Cas. ¶ 9715 at 88,415 (S.D. Ohio 1981). This conclusion must be reached since "the use of the present tense verb 'is' in subpart (i) makes the circumstances existing on the date of transfer the pertinent consideration for determining whether the transfer is irrevocable." *Id.* at 88, 416. To im-

pose the additional requirement that the grantor be under a disability from October 9, 1969 or that the Trust be irrevocable on that date completely rewrites the statute.

B. THE STRUCTURE OF § 642 (c) (2) INDICATES THE NEED FOR IRREVOCABILITY ONLY AT THE TIME OF TRANSFER TO THE CHARITABLE INSTITUTION.

The structure of § 642 (c) (2) also strongly indicates that the interest need only be irrevocable by the time of the transfer. Under § 642 (c) (2) (A) (ii) and § 642 (c) (2) (B) (i), (ii) and (iii), a specific date is provided as a cut-off date. In each subpart, the specified event must occur before the expressly stated date in order for the deduction to be allowed. No such cut-off date was included in § 642 (c) (2) (A) (i). Clearly, Congress could have included a similar provision in subpart (i) if it had so intended. The omission is a clear indication that the date of transfer would control, a date which would vary from case to case.

Under similar circumstances in *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963), this court reached such a result under the Clayton Act.

> [S]ince Congress expressly demonstrated in the immediately preceding provision of the Act that it knew how to expand the applicable concept of competition beyond the sole level of the seller granting the discriminatory price, it is reasonable to conclude that like clarity of expression would be present in § 2 (b) if the defense available thereunder were similarly intended to be broadly read to encompass, as is urged, the meeting of lower prices set not only by the offending seller's competitor, but also by the purchaser's competitor. There is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in § 2 (b) the same broad meaning of competition or competitor which it explicitly provided by inclusion in § 2 (a); the reasonable inference is quite the contrary.

Id. at 514-15. This inference is even stronger in the instant case where, of the five subparts, only subpart (A) (i) does not include a specific cut-off date. It is evident that no such date was intended.

C. THE GOVERNMENT'S INTERPRETATION OF § 642 (c) (2) (A) WOULD CAUSE A PART OF THAT PROVISION TO BE SUPERFLUOUS.

Additionally, the interpretation of the United states would cause a portion of § 642 (c) (2) (A) to be superfluous. This section provides that the trust must be "created on or before October 9, 1969." However, if subpart (i) is construed so as to require that the remainder interest must be irrevocable as of October 9, 1969, it is elemental that the trust must have been created on or before October 9, 1969. It is self-evident that a remainder interest of a trust cannot be irrevocable if the trust is not yet in existence.

A similar result is apparent under subpart (ii). If a grantor is under a mental disability to change the terms of the trust at all times after October 9, 1969, then he is under such a disability for the creation of the trust at all times after October 9, 1969. As to subpart (ii), therefore, the trust must have been created on or before October 9, 1969.

The requirement that the trust be created on or before October 9, 1969 is clearly superfluous as to subpart (ii). Therefore, in order for that provision to have any meaning, the interpretation of the Service as to subpart (i) must be rejected. This Court has consistently held that a statute must be construed, if possible, to give effect to each word and that no part of a statute should be construed so as to render another part redundant. The "cardinal principle of statutory construction is to save and not destroy." *Labor Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). This court will not adopt a strained reading of a statute "which renders one part a mere redundancy."

Jarecki v. G.D. Searle & Co., 367 U.S. 303, 308 (1961). *See also United States v. Menasche,* 348 U.S. 528, 538-39 (1955). The interpretation of the United States would yield such a redundancy in this case.

III

THE LEGISLATIVE HISTORY OF § 641 (c) WHILE AMBIGUOUS AND THEREFORE NOT CONTROLLING, IS CONSISTENT WITH THE PETITIONERS' CONSTRUCTION OF THE PROVISION.

The court has stated that there is no need to resort to the legislative history of an act where the provisions "are clear and unequivocal on their face." *United States v. Oregon,* 366 U.S. 643, 648 (1961). As demonstrated above, such is the case here.

Moreover, the Court has consistently stated that ambiguous legislative materials will not control over the customary meaning of words or rules of construction.

> Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable . . . .

United States v. Dickerson, 310 U.S. 554, 562 (1940). *See also United States v. Bishop,* 412 U.S. 346, 356 (1973); *N.L.R.B. v. Plasterers' Local No. 79,* 404 U.S. 116, 129 n.24 (1971).

The legislative history of § 642(c) (2) provides no clear indication of the intent of Congress under that section. Under the original House bill, the deduction was to be eliminated immediately for all set-asides by trusts. This provision is reflected in the House reports. *See, e.g.,* H.R. Rep. No. 413,

pt. I, 91st Cong., 1st Sess. at 57. Consequently, no reference may be found in the House materials as to the intent in enacting the exception for irrevocable remainder interests.

The necessity for exceptions to the general prohibition proposed by the House of Representatives was first raised in a Technical Memorandum of Treasury Position submitted to the Senate Finance Committee on September 9, 1969. That report states:

> Treasury recommends that this provision apply only with respect to taxable years beginning after December 31, 1969. Further, in a case where an irrevocable trust instrument has been executed on or prior to August 1, 1969, Treasury recommends that the requirements of this section should not apply unless and until it is possible to amend the instrument. Similarly, the provision should not apply with respect to an estate or trust pursuant to a will in existence on August 1, 1969, which is not subject to change under state law at any time prior to the testator's death because of the testator's incompetency or other disability.

Id. at 28. It is apparent that this report centers on the problem of instruments which cannot be amended after 1969. This proposed exception is reflected in the provisions of § 642(c) (2) (A) (ii) and § 642(c) (2) (B). It would stretch the report far beyond its intended limits to conclude that it proposed that remainder interests (nowhere mentioned in the report) should also be irrevocable as of the specified date.

The desirability of an exception for irrevocable remainder interests was then considered by the Senate Finance Committee. The Committee Report states:

> Accordingly, the committee amendments provide that the set-aside deduction is to continue to be available for a trust established before October 10,

> 1969, which is required by the terms of its governing instrument to set-aside amounts, either if an irrevocable remainder interest in the trust was given to charity or if the trust could not be modified at any time after October 9, 1969, because the grantor was under a mental disability to change its terms at all times after that date.

S. Rep. No. 551, 91st Cong., 1st Sess. at 86. This report provides that the remainder interest must be irrevocable but fails to state any date at which time the interest must be irrevocable. This is consistent with the conclusion reached earlier that no such date was intended and that no date could be specified since the date depended on the time of the transfer. The report mentions the cut-off date of October 9, 1969 but this clearly relates only to the power to modify the trust. The best that might be said for this provision is that it *might* be construed as requiring the interest to be irrevocable as of October 9, 1969. Such ambiguity, however, is insufficient to overcome the plain meaning of the statute and the rules of construction previously mentioned.

The same is equally true of various other references in the legislative materials to the exception for irrevocable remainder interests.

> [T]he Act provides that the set-aside deduction continues to be available for a a trust established before October 10, 1969, which is required by the terms of its governing instrument to set-aside amounts, either if an irrevocable remainder interest in the trust was given to charity or if the trust could not be modified at any time after October 9, 1969, because the grantor was under a mental disability to change its terms at all times after that date.

Joint Committee on Internal Revenue Taxation, General Explanation of the Tax Reform Act at 82.

(3) The committee amendments also restore the set aside deduction in the case of trusts established before October 10, 1969, with an irrevocable charitable remainder and trusts established before that date which could not be modified at anytime thereafter because the grantor was under a mental disability to do so.

Summary of Senate Amendments at 40.

These reports are at the very least ambiguous but they are also consistent with the construction that the interest need only be irrevocable at the time of the transfer. For example, the Joint Committee Report states that the deduction is to be allowed for a trust established before October 10, 1969 where "an irrevocable remainder interest in the trust was given to charity." It is undisputed that the interests set aside in this case were irrevocable.

In the absence of clear and unambiguous legislative materials the plain meaning of the statute as well as the rules of construction noted above must control. Under these principles, the interest need only be irrevocable at the time of the transfer.

IV.

THE PRESENT SITUATION IS WITHIN THE CONGRESSIONAL INTENT TO ALLOW THE DEDUCTION WHERE THE SETTLOR COULD NOT MODIFY THE TRUST INSTRUMENT TO CONFORM WITH THE NEW RULES.

Even assuming that the congressional intent was to stop all deductions for set-asides unless the interest was irrevocable as of October 9, 1969 or unless the trust could not be amended to take the changes into account, the present situation comes within that intent. The district court so noted:

> The trust at issue in this action certainly comes within the ambit of the congressional intent underlying the exception created by § 642(c) (2) (A). The trust instrument was signed at a time when set-aside deductions were allowed for amounts not currently paid to charitable beneficiaries. On the date the new rules went into effect, December 30, 1969, the only person with authority to modify the trust instrument, the settlor, was comatose (doc. 8, ¶ 8). The settlor died without regaining consciousness (*id.*). Hence, the trust instrument could not be modified to take the new rules into account.

Rush v. United States, 81-2 U.S. Tax. Cas. ¶ 9715 at 88,416. If congressional intent is to control then the instant case comes within that intent regardless of how that intent is construed.

V

THE GOVERNMENT'S CONSTRUCTION OF § 642(c) (2) (A) WOULD, IN VIOLATION OF GENERAL CONGRESSIONAL POLICY, PRECLUDE ANY TRANSITION PERIOD.

The interpretation placed upon § 642(c) (2) (A) would also serve to eliminate any transitional period between the old law and the application of the new. Such a result is inconsistent with previous enactments of Congress as they pertain to trusts and estates. For example, § 2055(e) (3), dealing with estate tax deductions for charitable gifts made by trusts and estates, has been amended on several different occasions in order "to allow a reasonable period of time to take the new rules into account." S. Rep. No. 1036, 96th Cong., 2d Sess. at 40. *See also* Pub. L. No. 97-34 § 403(e) (transitional period for implementation of unlimited marital deduction). Since trusts and estates involve long range planning and are dependent on the tax laws, such transitional periods are oftentimes necessary for a smooth transition to the new rules.

Under the interpretation advanced by the United States, either the trust must be unamendable or the remainder interest irrevocable as of October 9, 1969. Since this date predates the effective date of the statute, a trust settlor would be unable to alter the trust plan to any material extent if the set-asides were to qualify. Such a sudden change in rules as they pertain to trusts and estates is uncharacteristic of Congress. Since the Internal Revenue Code must be given "as great an internal symmetry and consistency as its words permit," *Commissioner v. Lester*, 366 U.S. 299, 304 (1961), the construction placed on this section by the United States should be rejected.

VI

THE GOVERNMENT'S CONSTRUCTION WOULD, WITHOUT A STATEMENT TO THAT EFFECT, CAUSE THE PROVISION TO HAVE A RETROACTIVE APPLICATION.

It is well settled that any doubts in a taxing statute must be resolved against the government.

> It is elementary that tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import. Doubts must be resolved against the Government and in favor of taxpayers.

Miller v. Nut Margarine, 284 U.S. 498, 508 (1932). See also *Hassett v. Welch*, 303 U.S. 303, 314 (1938).

Under a similar rule of construction it is also well settled that a statute will be construed to act only prospectively "in the absence of clear expression to the contrary." *Hassett* at 314. *See also Brewster v. Gage*, 180 U.S. 327, 337 (1930). Since the October 9, 1969 cut-off date proposed by the United States predates the effective date of the statute, the statute could affect events occurring before the

effective date of the statute. In the absence of a "clear expression" to the contrary, these rules of construction compel a conclusion contrary to that advanced by the United States even if the statute is found to be ambiguous.

CONCLUSION

For the foregoing reasons this could should grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Appendix A

Opinion of United States District Court

Filed August 27, 1981

UNITED STATES DISTRICT COURT

Southern District of Ohio

Western Division

KENNETH G. RUSH and THE FIFTH THIRD BANK, *Plaintiffs-Appellees,* vs. UNITED STATES OF AMERICA, *Defendant-Appellant.*	Civil Action NO. C-1-78-662 OPINION

PORTER, S.J.:

This is an action for the refund of federal income taxes and interest paid by a trust for the calendar years 1973 and 1974 in the respective amounts \$21,654.29 and \$54, 251.01 plus statutory interest. Plaintiffs have pursued their administrative remedies without success. The parties have agreed to submit this case to the Court for decision on stipulation of facts (doc 8.) and trial memoranda (docs. 9,10). This Court's jurisdiction is obtained pursuant to 28 U.S.C. § 1346(a).

FINDINGS OF FACT

The facts stipulated by the parties (doc. 8) are adopted by the Court as its findings of fact. Fed. R. Civ. P. 52(a).

CONCLUSIONS OF LAW

Two questions of law are presented in this action: (1) whether plaintiffs are entitled to deductions under 26 U.S.C. § 642(c) in the years 1973 and 1974 for certain amounts set aside by the trustees of a trust for the benefit of charitable institutions, and (2) whether 26 U.S.C. § 642(c) as amended on December 30, 1969 is unconstitutional as applied to the trust in issue.

Trusts generally compute taxable income in the same way as individuals, getting the same credits and deductions. 5 *P-H Federal Taxes* ¶ 28,033 (1981). Trusts are however, subject to special rules set out in section 642 of the Internal Revenue Code of 1954, 26 U.S.C. § 642.

At the time the trust at issue in this action was established subsection (c) of section 642 provided as follows:

> (c) Deduction for amounts paid or permanently set aside for a charitable purpose.–In the case of an estate or trust (other than a trust meeting the specifications of subpart B) there shall be allowed as a deduction in computing its taxable income (in lieu of the deductions allowed by section 170(a), relating to deduction for charitable etc., contributions and gifts) any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, *paid or permanently set aside for* a purpose specified in section 170(c), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention or cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetary not operated for profit. For this purpose, to the extent that such amount consists of gain from the sale or exchange of capital assets held for more than 6 months, proper adjustment of the deduction otherwise allowable under this subsection shall be made for any

deduction allowable to the estate or trust under section 1202 (relating to deduction for excess of capital gains over capital losses). In the case of a trust, the deduction allowed by this subsection shall be subject to section 681 (relating to unrelated business income and prohibited transactions). – (Emphasis added.)

The Tax Reform Act of 1969, enacted into law on December 30, 1969, amended section 642(c) to read, in pertinent part as follows:

(c) Deduction for amounts paid or permanently set aside for a charitable purpose.–

(1) General rule.–In the case of an estate or trust (other than a trust meeting the specifications of subpart B), there shall be allowed as a deduction in computing its taxable income (in lieu of the deduction allowed by section 170(a), relating to deduction for charitable, etc., contributions and gifts) any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, *paid for a purpose* specified in section 170(c) (determined without regard to section 170(c) (2) (A)). If a charitable contribution is paid after the close of such taxable year and on or before the last day of the year following the close of such taxable year, then the trustee or administrator may elect to treat such contribution as paid during such taxable year. The election shall be made at such time and in such manner as the Secretary prescribes by regulations.

(2) Amounts permanently set aside.–In the case of an estate, and in the case of trust (other than a trust meeting the specifications of subpart B) required by the terms of its governing instrument to set aside amounts which was–

(A) created on or before October 9, 1969, if–

(i) an irrevocable remainder interest is transferred to or for the use of an organization described in section *170(c)*, or

(ii) the grantor is at all times after October 9, 1969, under a mental disability to change the terms of the trust;

* * * * * * * * *

there shall also be allowed as a deduction in computing its taxable income any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, *permanently set aside* for a purpose specified in section 170(c), or is to be used exclusively for religious, charitable, scienfitic, literary, or educational purposes.

In the case of a trust, the preceding sentence shall apply only to gross income earned with respect to amounts transferred to the trust before October 9, 1969, or transferred under a will to which subparagraph (B) applies. (Emphasis added.)

The amending of § 642(c) was part of a major restructuring of tax code provisions governing charitable contribution deductions implemented by the Tax Reform Act of 1969. 2 *U.S. Code & Admin. News* (House Report) 1645, 1649 (1969). Prior to the amendment a trust that was not tax exempt could take a full deduction for any amount of its gross income which it either paid to or permanently set aside for charitable beneficiaries. *Id.* (Senate Report) at 2113. The specific purpose of the amendment was to eliminate the deduction for amounts permanently set aside for but not currently paid to charities. *Id.* at 2114 and (Conference Report) 2409. This amendment was part of a significant change in the general tax treatment of charitable remainder trusts – which are trusts, like the trust at issue

in this action, that provide that income from the trust principal be paid to a noncharitable beneficiary for a period of time and the remainder goes to charity. The prior law allowed current-year deductions of the present value of property initially transferred to charitable remainder trusts. *Id.* at 2116. Congressional research showed that the amount of the charitable deductions allowed did not necessarily have any relation to the value of the benefits actually received by the designated charities. *Id.* The intent of the legislative alterations was to eliminate such deductions completely. *Id.* at 2114, 2116. The amendment of § 642(c) so as to eliminate deductions for trust income that is added to an existing trust principal is consistent with the general legislative intent to eliminate all current-year deductions of amounts put into a charitable remainder trust. *Id.* at 2114.

Because § 642(c) as amended would apply to existing trusts as well as trusts established in the future, provision was made for existing trusts established in contemplation that the set-aside deduction would continue to be available and which could not be modified to take the new rules into account. *Id.* at 2115. This provision consists of § 642(c) (2) (A) (i) and (ii), set out above, and is explained in the Senate Report (*Id.* at 2115) as follows:

> [T]he . . . amendments provide that the set-aside deduction is to continue to be available for a trust established before October 10, 1969, which is required by the terms of its governing instrument to set-aside amounts, *either if an irrevocable remainder interest in the trust was given to charity or if the trust could not be modified at any time after October 9, 1969,* because the grantor was under mental disability to change its terms at all times after that date. The set-aside deduction is to continue to be available in these cases, however, only to the extent of income earned on amounts transferred to the trust prior to October 9, 1969.

Applying § 645(c), as amended and in light of its legislative history, to the facts stipulated in this action we conclude that plaintiffs are entitled to the charitable deductions claimed in 1973 and 1974. *The amounts deducted* in those years *were not paid directly* to a charitable beneficiary, therefore the general rule, § 642(c) (1), does not apply. *The amounts deducted were, however, permanently set aside for a charitable purpose* so the applicability of the exception for trusts existing prior to amendment, § 642(c) (2), must be explored.

In order for a set-aside amount to come within the exception created by § 642(c) (2) five requirements must be met, the last of which is in the alternative. First the trust must have been created before October 10, 1969. Second, the amount must be permanently set aside for a charitable purpose. Third, the set-aside must be required by the terms of the trust instrument. Fourth, the amount set aside must have been earned with respect to amounts transferred to the trust prior to October 9, 1969. Finally, either the remainder interest in the trust must be irrevocable or the grantor at all times after October 9, 1969 was under a mental disability to change the trust. *See* 26 C.F.R. § 1.642(c)-2(b) (3); 5 *P-H Federal Taxes* ¶ 28,064 (1981).

The facts stipulated in this action clearly show that the first two requirements have been met. The trust at issue was created on September 30, 1968 and the amounts of $42,883.01 in 1973 and $84,406.41 in 1974 were permanently set aside for the benefit of charitable beneficiaries.

Whether the third requirement has been fulfilled is difficult to ascertain in this action. The parties have ambiguously stipulated that,

> 8. On September 27, 1973, Trust #2 (as it is referred to in Exhibit A [the trust instrument]), was funded and *the amounts required by this trust* were permanently set aside for the benefit of the charitable beneficiaries,

for the tax years 1973 and 1974, [$42, 883.01, $84,406.41). (Doc. 8, emphasis added.)

Nevertheless, the trust instrument provides that the trustees have discretion to pay amounts from the principal and accumulated income of Trust #2, which is the charitable remainder part of the trust, to the Settlor's wife after Settlor's death (doc. 8, exh A, p. 3). Further, the trust instrument provides that the income of Trust #2 is to be divided among the children or grandchildren of Settlor's wife upon her death (*id.* p. 4). The trust instrument makes thus no affirmative declaration that amounts of income are to be set aside for charitable purposes, and it is possible, under the terms of the trust agreement, that no trust income would even be set aside for charitable purposes. The trust instrument does provide however, that income not paid to the individuals noted above is to be accumulated and ultimately paid to charitable beneficiaries (*id.* p. 4).

The language of § 642(c) (2) pertinent to the third requirement reads as follows, "in the case of a trust .. required by the terms of its governing instrument to set aside amounts .. " While the trust instrument in this action makes no specific directives as to set asides, it does in effect require that income not paid to designated individuals be set aside for charitable beneficiaries. Hence, it is fair to conclude that the third requirement has been fulfilled.

The fourth requirement, that amounts set aside have been earned with respect to amounts transferred to the trust before October 9, 1969, also raises some difficulty in this action. The parties have stipulated that, while the trust instrument was signed prior to October 9, 1969, Trust #2 was "funded" in 1973 (doc. 8, ¶¶ 5,8). The language of the trust instrument indicates "Trust #2" is the charitable remainder trust and that it was created upon the death of the settlor. The parties have stipulated that the settlor died on February 5, 1970 (doc. 8, ¶6). A reading of these facts alone indicates that the gross income set aside in 1973 and 1974 was earned with respect to amounts transferred to Trust #2 after October 9, 1969.

Plaintiffs' brief asserts, though it is not stipulated, that on the date settlor signed the trust instrument, September 30, 1968, he funded the initial trust with $3,600,000. There is not indication in the parties' memoranda or stipulation that any additional amounts were ever transferred to the trust principal, except the income set aside in 1973 and 1974. From this information it is fair to infer that the amounts set aside in 1973 and 1974 were earned with respect to the trust fund established by the settlor prior to October 9, 1969.

The fourth requirement is, nevertheless, not fulfilled unless it can also be inferred that Trust #2 was effectively created prior to October 9, 1969. The trust instrument signed by the settlor indicates that a trust was established at the time he signed the instrument. It also indicates that upon the settlor's death the trust fund was to be divided by the surviving trustees into two equal parts, Trust #1 and Trust #2. Trust #1 was to be used for the support of settlor's wife, any amount remaining in Trust #1 at the death of settlor's wife was subject to a power of appointment exercised in her will. Upon the death of settlor's wife Trust #2 was to be divided equally and held in separate trusts for the benefit of her children and grandchildren. Upon the death of the last to die of settlor's wife and her children the principal and any accumulated income of Trust #2 was to be divided equally between two charitable beneficiaries. The trust instrument also provided that if settlor's wife did not exercise her power of appointment as to the principal of Trust #1, that fund would be treated the same as the principal of Trust #2.

The trust instrument provides for only one set of trustees and provides only one set of trustee powers. Viewing these provisions along with the trust instrument's directives as to treatment of principal and income, it is fair to infer that the settlor intended that only one trust be created but that trust was to be divided into various parts or accounts, each being managed in a different way. This inference permits

a conclusion that Trust #2 was not a separate trust but rather part of the trust created and funded on September 30, 1968. Hence, Trust #2 was effectively created prior to October 9, 1969 and the fourth requirement is fulfilled.

The alternatives that can be satisfied in order to fulfill the fifth requirement are set out in subparts (i) and (ii) of § 642(c) (2) (A):

if -

> (i) and irrevocable remainder interest is transferred to or for the use of [a charitable] organization . . . or
>
> (ii) the grantor is at all times after October 9, 1969 under a mental disability to change the terms or the trust;

The parties have stipulated that the settlor in this action became mentally disabled on December 8, 1969 and never regained competence before his death on February 5, 1970 (doc. 8, ¶6). They have also stipulated that until December 8, 1969 settlor was able to conduct all of his personal and business affairs (*id.*, ¶7). From these stipulations it is apparent that settlor was under no mental disability from October 9, 1969 to December 8, 1969. Therefore it cannot be concluded, and plaintiffs do not argue, that settlor was under a mental disability "at all times" after October 9, 1969. Hence, the alternatives set out in subpart (ii) of § 642(c) (2) (A) cannot be used to satisfy the fifth requirement.

Determining whether the alternative set out in subpart (i) of § 642(c) (2) (A) can be used to satisfy the fifth requirement requires that the language of the trust instrument be scrutinized for clauses affecting revocability. Defendant points to three clauses:

> 4. *Control by Settlor:* So long as the Settlor is a Trustee hereunder, the decision of the Settlor shall prevail and be binding upon the Corporate Trustee and the remaining personal trustee as to all matters concerning the trustee estate, . . . (Doc. 8, exh A, p. 7.)

10. *Resignation or Removal of the Trustee.* Settlor retains the right during his lifetime to remove any Trustee at any time upon written notice to the Trustee (*id.* at p. 10).

13. *Amendment and Revocation.* The Settlor reserves the right, at any time and from time to time, by instrument in writing delivered to the Trustees, to amend, modify, or revoke this trust in whole or in part (*id.* at p. 12).

Defendant argues that these clauses, notably that last one listed, show that the entire trust was revocable and that the charitable remainder established by the trust instrument could therefore be revoked at any time prior to being paid over to the designated charities.

Plaintiffs acknowledge that the trust instrument provides for a revocable trust. They submit however, that the power of revocation was only with the settlor, and that settlor died prior to the set-asides and deductions at issue. Looking to the years for which deductions were claimed, 1973 and 1974, plaintiffs argue that at the time the set-asides were made no one could modify the trust, therefore the set-asides were interests irrevocably transferred for the use of charitable organizations.

This Court finds the argument of plaintiffs more persuasive. The word "is" in subpart (i) of § 642(c) (2) (A) indicates that the circumstances existing on the date of the transfer govern deductibility. In 1973 and 1974, when the set-asides at issue in this action were made, the trust instrument provisions directing that those amounts be ultimately used by designated charitable organizations could not be modified or revoked because the only person with authority to do so, the settlor, was dead. Therefore the set-asides were irrevocably committed to charitable use.

The defendant counters this position with two arguments. First, noting the language of § 642(c) (2) (A), defendant argues that the trust had to be irrevocable as of October 9, 1969 in order for a subsequent set-aside to be deductible. As a corollary defendant contends when a trust instrument is fully revocable, all future interests granted by the instrument are fully revocable. This Court agrees with defendant's corollary contention, however defendant misreads the language of § 642(c) (2) (A). The pertinent statutory language requires only that the trust be created on or before October 9, 1969; it does not require that the trust also be irrevocable as of that date. The word "irrevocable" in subpart (i) is used to describe the type of remainder interest that must be transferred in order for the trust to obtain a charitable deduction. As discussed above, the use of the present tense verb "is" in subpart (i) makes the circumstances existing on the date of transfer the pertinent considerations for determining whether the transfer is irrevocable. On the dates of the transfers that are the subject of this action the governing trust instrument was totally irrevocable, hence the future interests then granted under the instrument were totally irrevocable.

Defendant's second argument against the Court's construction of § 642(c) (2) (A) (i) is that it is contrary to the intent of Congress to eliminate deductions for amounts set aside but not actually paid over to charitable beneficiaries. This Court agrees with defendant that § 642(c) was amended with the intent of eliminating deductions for set-aside amounts that are not currently paid to charitable beneficiaries. In amending § 642(c), however, Congress created a narrow exception that allowed existing trusts to continue receiving deductions for amounts set aside for, but not currently paid to, charitable beneficiaries. As discussed above, the congressional purpose for creating this exception was to provide for existing trusts established in contemplation that the set-aside deducted would continue to be available and which could not be modified to take the new rules into account. The trust at issue in this action cer-

tainly comes within the ambit of the congressional intent underlying the exception created by § 642(c) (2) (A). The trust instrument was signed at a time when set-aside deductions were allowed for amounts not currently paid to charitable beneficiaries. On the date the new rules went into effect, December 30, 1969, the only person with authority to modify the trust instrument, the settlor, was comatose (doc. 8, ¶8). The settlor died without regaining consciousness (*id.*). Hence, the trust instrument could not be modified to take the new rules into account.

The Court concludes that the five requirements for deductibility under § 642 (c) (2) (A) have been fulfilled and that the deductions claimed by plaintiffs for 1973 and 1974 should have been allowed by defendant.

As initially noted in this opinion, the legal issue of whether § 642(c) as amended on December 30, 1969 is unconstitutional as applied to the trust in issue has also been presented. This issue was raised by plaintiffs as an alternative to their contention that they are entitled to deductions pursuant to § 642(c) (2). Since this Court holds that plaintiffs are entitled to deductions pursuant to § 642(c) (2), the constitutional issue noted need not and should not, be decided. *See Siler* v. *Louisville & Nashville R.R. Co.,* 213 U.S. 175, 193 (1909).

/s/ David S. Porter
United States Senior
District Judge

Appendix B

Judgment of United States District Court

Filed August 27, 1981

UNITED STATES DISTRICT COURT

Southern District of Ohio

Western Division

KENNETH G. RUSH and THE FIFTH THIRD BANK, *Plaintiffs-Appellees,* vs. UNITED STATES OF AMERICA, *Defendant-Appellant.*	Civil Action NO. C-1-78-662 JUDGMENT

This action came on for (hearing) before the Court, Honorable David S. Porter, United States District Judge, presiding and the issues having been duly (heard) and a decision been duly rendered,

It is Ordered and Adjudged that the issues are found joined in favor of the plaintiffs, Kenneth G. Rush and The Fifth Third Bank, and against the defendant, United States of America, in the amount of SEVENTY-FIVE THOUSAND NINE HUNDRED FIVE DOLLARS AND THIRTY CENTS ($75,905.30) plus statutory interest.

Dated at Cincinnati, Ohio, this 15th day of September, 1981.

John D. Lyter
Clerk of Court

Elizabeth Schaeffer
Deputy Clerk

Appendix C

Opinion of United States Court of Appeals

Filed December 17, 1982

No. 81-3701

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH G. RUSH and THE FIFTH THIRD BANK, *Plaintiffs-Appellees,* vs. UNITED STATES OF AMERICA, *Defendant-Appellant.*	APPEAL from the United States District Court for the Southern District of Ohio

---

Decided and Filed December 17, 1982

Before: EDWARDS, Chief Circuit Judge, KEITH and CONTIE, Circuit Judges.

PER CURIAM. This is an appeal from a judgment entered in favor of a taxpayer allowing deductions for certain sums set aside by a trust for charitable purposes. The facts in the case are not in dispute and are stated as follows from the brief of the United States:

> On September 30, 1968, Linus E. Russell executed a trust instrument. The trust was funded with a check for $3,600,000. The trust agreement provided for the payment of its net income to Mr. Russell during his lifetime.
>
> Upon his death, if survived by his wife Ruth, the trust provides that its assets are to be divided into and

apportioned among Trusts #1 and #2. All of the income of Trust #1 is to be paid to Ruth during her lifetime, and principal may be invaded, if necessary, for her support.

The income from Trust #2, however, is to be accumulated during Ruth's lifetime. As with Trust #1, the trustees may invade principal and income in order to meet Mrs. Russell's needs, but only after having exhausted the assets in Trust #1.

Upon Ruth's death, Trust #2, is to be divided into two equal parts for the benefit of her two children. The income earned from such assets is to be paid to each child during his or her lifetime. Upon the death of the last to die of Ruth and her two children, the principal and income of Trust #2 shall be paid equally to two charities; the Sisters of Mercy of Cincinnati, Ohio, Inc. for the use and benefit of Mercy Hospital, Springfield, Ohio, and the Board of Directors of Wittenberg College, Springfield, Ohio.

Item 13 of the Trust Agreement provides:

> The Settlor reserves the right, at any time, and from time to time, by instrument in writing delivered to the Trustees, to amend, modify, or revoke this trust in whole or in part.

Prior to December 8, 1969, Linus E. Russell was able to conduct all of his personal and business affairs. On December 8, 1969, he was admitted to a hospital in Springfield, Ohio. From that date until December 22, 1969, he was in a confused state and unable to attend to his financial affairs. On December 22, 1969, Mr. Russell was transferred to the Ohio State University Hospital in Columbus, Ohio. He remained in a comatose condition until his death on February 5, 1970.

On September 27, 1973, Trust #2 was funded and, in accordance with its terms, amounts of $42,883.01 and $84,406.41 were permanently set aside in 1973 and 1974 for the benefit of the charitable beneficiaries. Following the payment of taxes on disallowed deductions for these amounts, the trustees filed claims for refund with the International Revenue Service. Upon the rejection of those claims, the trustees filed suit for the refund of taxes and interest paid. In their complaint, the trustees claimed a charitable deduction on behalf of the Trust for amounts permanently set aside for charity.

On September 15, 1981, the District Court entered an opinion and order allowing the claimed charitable deductions. Judgment in conformity with the opinion was entered on the same date. From that adverse judgment, the United States brings this appeal.

The principal issue in the case is whether a trust written and funded as a revocable trust prior to October 9, 1969, is entitled to a deduction under 26 U.S.C. § 642(c) (Supp. 1982), for amounts set aside by the trustees for the benefit of two charitable institutions in the years 1973 and 1974 - years in which the trust had become irrevocable as a result of the incompetency and subsequent death of the settlor.

The provision in dispute here was part of the Tax Reform Act of 1969, during which year Congress enacted an amendment to § 642(c) as follows:

(c) Deduction for amounts paid or permanently set aside for a charitable purpose.-

(1) General rule.-In the case of an estate or trust (other then a trust meeting the specifications of subpart B), there shall be allowed as a deduction in computing its taxable income (in lieu of the deduction allowed by section 170(a), relating to deduction for charitable, etc., contributions and gifts) any amount of the gross income, without limitation, which is pursuant to the terms of the

governing instruments is, during the taxable year, paid for a purpose specified in section 170(c) (determined without regard to section 170(c) (2) (A)). If a charitable contribution is paid after the close of such taxable year and on or before the last day of the year following the close of such taxable year, then the trustee or administrator may elect to treat such contribution as paid during the such taxable year. The election shall be made at such time and in such manner as the Secretary prescribes by regulations.

(2) Amounts permanently set aside.–In the case of an estate, and in the case of a trust (other than a trust meeting the specifications of subpart B) required by the terms of its governing instrument to set aside amounts which was–

(A) created on or before October 9, 1969, if–

(i) an irrevocable remainder interest is transferred to or for the use of an organization described in section 170(c) or

(ii) the grantor is at all times after October 9, 1969, under a mental disability to change the terms of the trust; or

(B) established by a will executed on or before October 9, 1969, if–

(i) the testator dies before October 9, 1972, without having republished the will after October 9, 1969, by codicil or otherwise,

(ii) the testator at no time after October 9, 1969, had the right to change the portions of the will which pertain to the trust, or . . .

The critical interpretation involved here pertains to Paragraph 2, and particularily (A) (i) thereof. It is appellees' earnest contention, with which the District Judge agreed, that the fact that the two irrevocable set-asides for charity with which we are currently concerned, were made well after the effective date of this Act, October 9, 1969, does not in any way serve to establish taxability, even though the entire trust was revocable as of October 9, 1969. The District Judge stated this argument in its most effective form, as follows:

> Plaintiffs acknowledge that the trust instrument provides for a revocable trust. They submit, however, that the power of revocation was only with the settlor, and that settlor died prior to the set-asides and deductions at issue. Looking to the years for which deductions were claimed, 1973 and 1974, plaintiffs argue that at the time the set-asides were made no one could modify the trust, therefore the set-asides were interests irrevocably transferred for the use of charitable organizations.
>
> This Court finds the argument of plaintiffs more persuasive. The word "is" in subpart (i) of § 642(c) (2) (A) indicates that the circumstances existing on the date of the transfer govern deductibility. In 1973 and 1974, when the set-asides at issue in this action were made, the trust instrument provisions directing that those amounts be ultimately used by designated charitable organizations could not be modified or revoked because the only person with authority to do so, the settlor, was dead. Therefore, the set-asides were irrevocably committed to charitable use.

The government to the contrary contends that the language of the statute, albeit not completely dispositive, can be more appropriately interpreted as requiring that the charitable remainders referred to therein must be established irrevocably on or prior to October 9, 1969. While we

recognize that fact that appellees' argument as adopted by the District Court can be defended with logic, we believe the government's argument concerning the interpretation of the statute itself is a much more likely version of Congressional intent.

We also believe that the legislative history of this enactment requires the interpretation which we have placed on the statutory language. An examination of legislative history must start with the first version of amendments to section 642(c) of the I.R.C. proposed by the House of Representatives as part of the Tax Reform Act of 1969. According to the House Report, all deductions for funds set-aside by trusts would be eliminated. H.R. Rep. No. 413, 91st Cong., 1st Sess. 4 (1969). The "set-aside" deduction was eliminated to retain consistency with other amendments placing limits upon charitable deductions and to assure a reasonable correlation between the amount of the charitable deduction claimed and the benefits the charities would ultimately receive. H.R. Rep. No. 413, 91st Cong., 1st Sess. 56-57 (1969); *see* S. Rep. No. 552, 91st Cong., 1st Sess. 84 (1969).

While the House version of the Tax Reform Act of 1969 would have eliminated the set-aside deduction entirely, the Senate felt it appropriate to grant an exception to existing trusts established in contemplation that the set-aside deduction would remain available and which could not be modified to take the new rules into account. S. Rep. No. 552, *supra* at 85-86.

> Accordingly, the committee amendments provide that the set-aside deduction is to continue to be available for a trust established before October 10, 1969, which is required by the terms of its governing instrument to set-aside amounts, either if an irrevocable remainder interest in the trust was given to charity or if the trust could not be modified at any time after October 9, 1969, because the grantor was under a mental disability to change its terms at all times after that date.

Id. at 86.

We believe that the Congressional purpose was to exempt those charitable set-asides which had become irrevocable before October 9, 1969. We doubt that either House of Congress ever considered the possibility that its language might be construed as making such set-aside possible if they were made in irrevocable terms after that date. While we make no contention that this construction is the only one possible, it seems to this court to fit the legislative history and the statutory language and to achieve the ulitimate Congressional purpose.

We find no constitutional barrier to the interpretation of the statute set forth above. *See United States* v. *Darusmont,* 449 U.S. 292 (1981).

The judgment of the District Court is reversed.

Appendix D

Judgment of United States Court of Appeals

Filed December 17, 1982

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 81-3701

KENNETH G. RUSH and THE FIFTH THIRD BANK, *Plaintiffs-Appellees,*	Plaintiffs-Appellees,
vs.	C-1-78-662
UNITED STATES OF AMERICA, *Defendant-Appellant.*	Defendant-Appellent.

Before: EDWARDS, Chief Circuit Judge,
KEITH and CONTIE, Circuit Judges.

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case by and the same is hereby reversed.

Each party to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/

Clerk

A True Copy

Attest:

/s/

Deputy Clerk

Appendix E

Order on Application for Rehearing

Filed January 21, 1983

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH G. RUSH and THE FIFTH THIRD BANK, *Plaintiffs-Appellees,* vs. UNITED STATES OF AMERICA, *Defendant-Appellant.*	ORDER

Before: EDWARDS, Chief Judge,
KEITH AND CONTIE, Circuit Judges.

On receipt and consideration of a petition for rehearing in the above-styled case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's opinion,

Now therefore, the motion for rehearing is hereby denied,

Entered by order the of Court

/s/
Clerk

CERTIFICATE OF SERVICE

State of Ohio :
: SS
County of Clark :

The undersigned, hereby certifies that the within petition was filed in accordance with Rule 28, Rules of the Supreme Court of the United States of America by depositing the requisite number of copies in a United States Post Ofice with first class postage prepaid and properly addressed to the Clerk of the Supreme Court of the United States of America on the 13 day of April, 1983.

Further that he served the requisite number of copies upon the following parties:

1. Solicitor General of the United States
   Department of Justice
   Washington D.C. 20530

2. United States Department of Justice
   Tax Division
   Washington D.C. 20530
   Attention: Steven Frahm

Kenneth G. Rush

Kenneth G. Rush

Sworn to before me this 13 day of April, 1983.

Patricia J. Clark

Notary Public, State of Ohio

PATRICIA J. CLARK, Notary Public
In and for the State of Ohio
My Commission Expires Nov. 4, 1987